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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY C. CALLOWAY,

Defendant and Appellant.

E073666

(Super.Ct.No. 19CJ000856)

OPINION

APPEAL from the Superior Court of San Bernardino County. Patrick Lyle Christianson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Meredith S. White, Deputy Attorney General, for Plaintiff and Respondent.

## I.

### INTRODUCTION

Defendant was arrested in Los Angeles County while he was on supervised release in San Bernardino County. After resolution of the Los Angeles County matter, he was released to San Bernardino County to face charges of violating the terms of his supervision order. Defendant received presentence custody credits for the five days he spent in jail in San Bernardino County before being sentenced. He now contends he is entitled to an additional 30 days of presentence custody credits and 30 days of conduct credits for the time he spent in custody in Los Angeles County. Having found nothing in the record to support an increase in the number of presentence custody credits applicable to defendant's San Bernardino case, we affirm.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

Defendant was ordered to wear a tracking device as a condition of his postrelease community supervision (PRCS) order. On April 11, 2019, the device was removed, and a tamper alert was sent out. Defendant contacted his probation officer by telephone, and the probation officer directed him to keep the device with him and charged, and to report to the probation office no later than April 15, 2019, to obtain a replacement device. On April 13, 2019, the battery to the device died.

On April 15, 2019, defendant was arrested in Los Angeles County for trying to steal a car, and he was found with methamphetamine. He was charged with possession of a controlled substance pursuant to Health and Safety Code, section 11377, subdivision (a), then released on his own recognizance. The Los Angeles Police Department contacted defendant's probation officer and informed her of the incident. San Bernardino County Superior Court then issued a bench warrant for defendant's arrest on April 16, 2019, based on his violation of the PRCS order. Defendant was rearrested in Los Angeles on April 17, 2019, as he was walking down the street. Police discovered the outstanding warrant from San Bernardino County and held defendant without bail.

On May 7, 2019, defendant pleaded guilty to unspecified charges in Los Angeles County and was sentenced to 120 days.<sup>1</sup> He served 10 days in jail, then was transported to San Bernardino County on May 16, 2019. At his arraignment on May 20, 2019, defendant admitted to violating his PRCS by failing to keep his GPS device charged.

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<sup>1</sup> In his appeal, defendant claims that there were no charges filed against him in the Los Angeles County case. This assertion is not borne out by the record. Defendant told the court that he was charged "for the LA charge" on May 7, 2019. He also admitted to entering a guilty plea. His counsel told the court: "Apparently he plead on May 7 I think to the new charge." "So he pled on the 7th of May but he was released to us on the 16th of May." There is nothing in the record indicating the charge to which defendant pleaded guilty. However, if defendant had a supervision or probation order in Los Angeles similar to the PRCS order in San Bernardino County, the court could impose a sentence based on a violation of that order even if defendant's current charges in Los Angeles were dismissed as defendant contends. This might explain the 120-day sentence and 10 days of postsentence incarceration. It would also be consistent with defendant's assertion that his current charges were dismissed as soon as he entered a guilty plea.

(Pen. Code,<sup>2</sup> § 3455.) The court reinstated the supervision order with the modification that defendant must serve 160 days in county prison. Defendant received presentence credits of five days actually served, pursuant to section 4019. After sentencing, defendant moved to increase his presentence custody credits. The matter was first heard on June 5, 2019, but the motion was denied because the defendant did not have court records from Los Angeles County to support his claim. At a second hearing on July 10, 2019, defendant's counsel presented a document to the court confirming that defendant was released on his own recognizance on April 15, 2019.<sup>3</sup> Defendant argued that the only reason he was taken back into custody on April 17, 2019, was the San Bernardino County warrant. However, the court found that defendant was not solely in custody for the San Bernardino matter, so he was not entitled to additional presentence credits. It awarded him two additional days of credit for an unspecified period before charges were filed against defendant in Los Angeles, for a total of 58 days of actual time served, plus conduct credit for those days pursuant to section 4019.<sup>4</sup> Defendant timely appealed the judgment on September 4, 2019.

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<sup>2</sup> All future statutory references are to the Penal Code unless otherwise stated.

<sup>3</sup> We note that this document was not included as part of the record on appeal.

<sup>4</sup> There is no explanation for the additional two days, but as neither party has raised this issue, we do not address it.

### III.

#### DISCUSSION

The single issue raised by defendant is whether he is entitled to additional presentence custody credits. Defendant first moved for relief in the trial court as required by sections 1237 and 1237.1, so he may appeal the court's July 10, 2019 denial order. (§§ 1237, 1237.1.) We recognize that defendant has completed serving his 160-day sentence in San Bernardino County, and on this basis the Attorney General argues the case is now moot. Defendant contends the appeal is not moot because presentence credits may still be applied to outstanding fines and fees pursuant to section 2900.5, subdivision (a), and the issue of presentence credits is a matter of public interest justifying review (citing *People v. Sellner* (2015) 240 Cal.App.4th 699, 701; *People v. DeLeon* (2017) 3 Cal.5th 640, 645-646). It is true that where the defendant has completed his sentence and is no longer subject to postrelease supervision, the issue of presentence custody credits is moot if there are no fines or other amounts "against which excess presentence custody credits may be applied." (*People v. Petri* (2020) 45 Cal.App.5th 82, 93.) Here, the record is silent as to whether defendant was subject to fines as part of his PRCS order. If the additional credits defendant seeks could be used to offset an existing fine, the matter would not be moot. Moreover, even when a defendant has completed his sentence, appellate courts have the discretion to consider a case where, as here, the issue of credits would otherwise evade appellate review. (See *People v.*

*Santa Ana* (2016) 247 Cal.App.4th 1123, 1127, fn. 3 (*Santa Ana*).) We therefore decline to dismiss the appeal on mootness grounds.

On review, we begin with the presumption that the trial court's judgment was correct, and we look to the record to determine whether defendant has met his burden of affirmatively demonstrating error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549-550.) We conclude he has not. In his opening brief, defendant argues that he is entitled to custody and conduct credits for the entire 30-day period he was in custody in Los Angeles County, pursuant to section 4019. However, section 2900.5, subdivision (b), limits the application of credits to those cases "where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).)

Defendant insists the San Bernardino charges were the sole reason he was in custody, because the charges against him in Los Angeles County were dropped. Unfortunately, our ability to inquire into the validity of this claim is impaired by the absence of any record of the proceedings in Los Angeles County. In particular, there are no records of defendant's arrests on April 15, 2019, or April 17, 2019, and no transcripts of the sentencing hearing on May 7, 2019. Without such records, we cannot ascertain the basis for defendant's re-arrest on April 17, 2019.

The minimal record we do have before us contradicts defendant's position. At the July 10, 2019 hearing, defense counsel told the court that they "pulled him over" on April 17, 2019, as defendant was "walking down the street." She stated police "found he

had a warrant for [the PRCS] case at the time he was taken in.” She further explained that defendant “was picked up on this case *while he was in custody dealing with his [Los Angeles] case.*” These statements suggest defendant was arrested for the PRCS violation after being taken into custody for another matter in Los Angeles County. Further, the record reflects that defendant was convicted on May 7, 2019, and sentenced to 120 days in Los Angeles County for an unidentified offense, and served 10 days of that sentence in county prison before being released to San Bernardino County.<sup>5</sup> The offense upon which the 120-day sentence was based could have provided a reason to hold defendant in custody, regardless of the San Bernardino County PRCS violation.

Pursuant to section 2900.5, subdivision (b), defendant’s sentencing on May 7, 2019, precludes him from receiving any presentence credits in San Bernardino for the time period between May 7, 2019, and May 16, 2019. (See *In re Rojas* (1979) 23 Cal.3d 152, 155-156 (*Rojas*) [defendant does not receive credit for time spent in custody if he is already serving a term of incarceration during the same period].) The time between April 17, 2019 and May 6, 2019, is a bit more complicated, because defendant could have been in custody during that period for both the San Bernardino offense and the Los Angeles offense. Case law regarding presentence custody credits that are attributable to

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<sup>5</sup> The hearing transcripts reveal numerous references, made by defendant, defense counsel, the prosecutor, and defendant’s probation officer, to a 120-day sentence imposed against defendant in Los Angeles County on May 7, 2019. We find this evidence to be more than “sheer speculation,” as defendant suggests. Defendant fails to offer any explanation for this sentence, and his appeal completely ignores the fact that he was kept in Los Angeles County prison for an additional 10 days after sentencing before being released to San Bernardino County.

more than one case is complex and diverse. (See, e.g., *Santa Ana*, *supra*, 247 Cal.App.4th at pp. 1131-1138, discussing *Rojas*, at pp. 154-155, *In re Joyner* (1989) 48 Cal.3d 487 (*Joyner*), *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), and their progeny.) However, in a case like this one involving dual restraint for two unrelated offenses in different jurisdictions, the Supreme Court held that “duplicative credits against separately imposed concurrent sentences for unrelated offenses will be granted only on a showing of strict causation.” (*Joyner*, at p. 489.) In other words, defendant must prove he “would have been at liberty during the period were it not for a restraint relating to the proceedings resulting in the later sentence.” (*Ibid.*) The record here is insufficient to demonstrate that defendant would have been released but for the San Bernardino hold. (See *People v. Odom* (1989) 211 Cal.App.3d 907, 910-911.) In addition, defendant may have already received credit for the time between April 17, 2019, and May 6, 2019, in Los Angeles County, because the record suggests that custody credits were awarded in the Los Angeles case. At the July 10, 2019 hearing, defense counsel stated: “[H]e got credits for LA County,” and “He gets credits for there, not for here. Okay.” Section 2900.5, subdivision (b), was not intended “to bestow the windfall of duplicative credits.” (*Bruner*, at p. 1191.) “[A]s the party claiming credit,” it is the defendant who has the burden of demonstrating that he is entitled to credit for a particular period. (*People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.) Defendant has not met this burden, so his claim fails.



IV.

DISPOSITION

The judgment is affirmed.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

MENETREZ  
J.